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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

HOMEWORX FRANCHISING, LLC, a Utah
limited liability company,

Plaintiff,

vs.

DODGE MEADOWS, an individual, STEVE
HOFER, an individual, ERIC BARR dba
HOMEWORX OF DENVER,

Defendants.

**REPLY MEMORANDUM IN
RESPONSE TO THE OPPOSITION
TO THE MOTION TO STRIKE**

Case No. 2:09-cv-11 DAK

Judge Dale A. Kimball

The Plaintiff HomeWorx Franchising, LLC respectfully submits this Memorandum in
Further Response to the Opposition to its Motion to Strike.

ARGUMENT

The Original Motion is Moot. Defendants filed their Motion to Join Third Parties as Counterdefendants on July 30, 2009 ("Original Motion"). Docket 29. The Plaintiff filed its Motion to Strike the Original Motion on August 10, 2009. Docket 30. Defendant, admitting to problems with the Original Motion, filed an Amended Motion to Join Third Parties as Counterdefendants on September 10, 2009 ("Amended Motion"). Docket 33. Defendant, however, also filed a Memorandum in Opposition to the Motion to Strike on September 10, 2009 ("Opposition"). Docket 34. As set forth, *infra*, the filing of an Amended Motion moots the Original Motion.

Defendant admits that "The [Original] Motion may not have been 'properly brought' before this Court." Opposition, p.2. The Defendant continues, "I have taken remedial action by filing an amended motion accompanied by a Memorandum. . . ." *Id.*

The Original Motion (Docket 30) is moot with the filing of the Amended Motion (Docket 33). *See eg, Perkins v. Johnson*, 2007 U.S. Dist. LEXIS 51222, 2007 WL 2071660, *1 (D. Colo. July 16, 2007) (Blackburn, J.)(unpublished) ("Because the Amended Motion to Dismiss or for Summary Judgment supersedes defendant Shifrin's original motion", the original motion was denied as moot); "Matex's corrected motion for summary judgment supersedes and moots the original motion, rendering it a nullity." *International-Matex Tank Terminals - Ill. v. Chem. Bank*, 2009 U.S. Dist. LEXIS 38105 (W.D. Mich. Apr. 23, 2009)(unpublished), *citing, In re CMS Energy Secs. Lit.*, 236 F.R.D. 338, 339 n.1 (E.D. Mich. 2006); "This matter comes before the Court on defendant's Amended Motion to Dismiss Complaint. . . .Also pending is defendant's original Motion to Dismiss (doc. 12). Because that Motion was displaced and superseded by

defendant's subsequent Amended Motion to Dismiss, the initial Motion to Dismiss (doc. 12) is moot. *Westchester Surplus Lines Ins. Co. v. Pass Condo. Ass'n*, 2009 U.S. Dist. LEXIS 56384 (S.D. Ala. July 1, 2009)(unpublished). These cases each stand for the proposition that filing an amended motion moots the original motion. Thus, this Court should moot the Original Motion.

Because the Original Motion is moot, the Motion to Strike is not before the Court. Defendants were not required to file an Opposition because they instead decided to file an Amended Motion. While the Opposition appears to argue points on how the Original Motion was proper, this misses the issue. The arguments of Defendants in its Opposition are not at issue because Defendant mooted them by the filing of the Amended Motion; the Plaintiff will timely address the substance of the Amended Motion in a separate filing.

CONCLUSION

This Court should declare the Original Motion as moot.

DATED the 22th day of September, 2009.

MACKEY PRICE THOMPSON & OSTLER

By: /s/ Blake T. Ostler
Blake T. Ostler

CERTIFICATE OF SERVICE

I hereby certify that on the 22th day of September, 2009, I caused to be served by the method indicated below a true and correct copy of the foregoing document on the following:

☐ VIA FACSIMILE
☐ VIA HAND DELIVERY
☒ VIA U.S. MAIL
☐ VIA FEDERAL EXPRESS

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